IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.7677 OF 2004

Meenaxi Kashinath Patil, .. Petitioner.

Vs

Kashinath Namdeo Patil, .. Respondent.

Mr P.R.Naidu, for the petitioner.

CORAM : D.B.BHOSALE,J.

DATE : 17th September, 2004.

PC:

1. Heard the learned counsel for the petitioner.

2. This petition is directed against the order dated 7.8.2004 passed by Family Court no.2, Mumbai in Misc.Application No.37 of 2001, rejecting the oral application made by the counsel for the petitioner across the bar raising objection for treating the affidavit-in-reply filed in Misc Application No.37 of 2001 as written statement. Heavy reliance was placed on the judgment of this court in Ramesh Thakkar Vs. Renuka D.Bageria (Appeal from order no.752 of 1996 dated 14.8.1996), by which this Court, while disposing of the Appeal from Order, made following observations:-

> "Before I close, I would like to observe that in number of cases I have found that the City Civil

> Court orders the affidavit-in-reply of the defendant to the notice of motion to be treated as the written statement. If that is the general practice then it deserves to be curbed and discontinued. An affidavit is in the nature of evidence and cannot partake the character of pleadings and therefore cannot be a substitute of written statement. It is not in the interest of justice nor is proper that an Affidavit-in-reply to the Notice of Motion is ordered to be treated as written statement. If the concerned Court feels that written statements are not filed in time by the defendant and they protract the litigation on this ground, the same can be tackled by passing appropriate orders fixing time in filing written statements. Accordingly, copy of this order should be sent to the Principal Judge, City Civil Court, Bombay for his information as well as for circulation to the other Judges of the City Civil Court."

3. The affidavit-in-reply to the main application was filed by the respondent-husband on 16.4.2003. There does not seem to be any dispute that until he filed the Affidavit-in-rely, he had not applied for allowing him to be represented through legal practitioner as required

under section 13 of the Family Court Act,1984. It appears that the said reply was treated by the Family Court as written statement and the Court proceeded with the hearing of the case. For the first time, when the evidence of the petitioner-wife was being recorded on 7.8.2004, an objection was raised by the counsel across the bar for treating the affidavit-in-reply as written statement. The contention urged by the advocate for the petitioner-wife was that the respondent cannot be permitted to cross-examine the petitioner in the absence of the written statement. Mr.Naidu, learned counsel for the petitioner, wanted me to consider the issue as to whether an affidavit-in-reply to the main petition before the Family Court could be treated as written statement by admitting the petition and staying further proceedings before the Family Court. I am at a loss to understand why such request was made. The Family Court, while rejecting the oral application, has observed that the order dated 14.8.1996 passed in Appeal from order no.752 of 1996 would not apply to the facts of the present case.

4. The basic difference between the facts of that case and in the instant petition is that in the instant proceedings, the affidavit was filed in reply to the main petition and not to an application seeking interim

relief. An affidavit in reply to the notice of motion is always in the nature of evidence and cannot partake the character of pleadings and, therefore, it was held that it cannot be a substitute of written statement. That is not the case in the instant petition. Nomenclature "affidavit-in-reply" in my opinion, would not disentitle the respondent in the matrimonial petition from treating it as written statement, if it is filed in reply to the main petition and if it is in the nature of written statement. There is no provision in the Family Court Act requiring the respondent in the petition to file affidavit-in-reply and thereafter written statement at later stage. If the reply filed to the main petition is in the nature of written statement and if the respondent desires that to be treated as written statement, I find no reason to refuse such permission, more particularly when it is filed by the party in-person. In the instant case, when the affidavit-in-rely was filed on record, it was filed by the respondent-husband in-person and not by the legal practitioner. I, therefore, find no error of law in treating the affidavit-in-reply as written statement in the instant proceedings. In view of the peculiar facts and circumstances of the case, in my opinion, interest of justice would be served if I direct the Family Court to dispose of the Application for enhancement of the

maintenance within timeframe instead of keeping this petition pending and depriving the wife who is fighting this litigation for last several years for maintenance. Her interest will be better protected by giving such direction to the Family Court. This petition is, therefore, dismissed. The Family Court shall decide the application, bearing Misc. Application No.37 of 2001 on merits in accordance with law as expeditiously as possible and preferably within a period of three months from today.

. The petitioner to produce a copy of this order before the Family Court within two weeks from today.

. An authenticated copy of this order may be made available to the parties.

(D.B.BHOSALE, J.)